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No. _____

# In The Supreme Court of the United States

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**FRANK DEMETRIC DICKERSON, JR.,**
*Petitioner,*

**v.**

**UNITED STATES OF AMERICA,**
*Respondent.*

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

1. Whether this Court should resolve the conflict among the circuit courts of appeal on how to apply the double jeopardy protections of the Fifth Amendment to successive prosecutions of a defendant for drug distribution conspiracies under 21 U.S.C. §846.

## PARTIES TO THE PROCEEDINGS

The Petitioner is Frank Dickerson, Jr. The Respondent is the United States.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Frank Demetric Dickerson, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming, on interlocutory appeal, the decision of the United States District Court in Maryland denying a Motion to Dismiss a federal prosecution for a drug distribution conspiracy in Maryland in violation of 21 U.S.C. § 846 when the defendant had previously been convicted in the Southern District of Florida for a conspiracy to distribute drugs, also in violation of 21 U.S.C. §846, which included allegations of the defendant's drug distribution activities in Maryland.

## OPINIONS BELOW

The opinion of the court of appeals is unpublished and is reprinted in Appendix A to this Petition. The order of the court of appeals denying the petition for rehearing and suggestion for rehearing en banc is reprinted in Appendix B. The underlying opinion of the district court is reprinted in Appendix C.

## JURISDICTION

The judgment of the court of appeals was entered on 7 February 2000. Pet. App. A. A petition for rehearing en banc was denied on 14 April 2000. Pet. App. B. This Court's

jurisdiction is invoked under 28 U.S.C. § 1251(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The statutory provision pertinent to this petition is: 21 U.S.C. § 846.

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

## STATEMENT OF THE CASE

On 5 November 1997, a grand jury for the District of Maryland indicted Frank Demetric Dickerson, Jr. Count 1 of

the indictment alleged a conspiracy to distribute cocaine in violation of 21 U.S.C. §846. The conspiracy allegedly began "in or about 1990. . ." and continued "up to and including on or about December 28, 1996 . . ." in Maryland, Florida, New York, South Carolina, Virginia, and elsewhere. Its members were alleged to include persons who were "known and unknown". A separate count charged him with a specific distribution on 28 December 1996. Mr. Dickerson was arrested on that indictment on 21 November 1997 in a sting operation arranged and orchestrated by an undercover informant. Additional cocaine was seized at that time. On 11 February 1998, a superceding indictment was obtained from the same grand jury. It added a new count based on allegations regarding the events of 21 November 1997. The time frame then became from "in or about 1990 up to and including on or about 21 November 1997. . ." The areas in which the distribution conspiracy allegedly operated remained Maryland, Florida, New York, South Carolina, Virginia and elsewhere (unspecified). The co-conspirators remained unnamed persons who were "known and unknown."

At the time of the Maryland indictment, Mr. Dickerson was also under indictment in the Southern District of Florida for violating the same Code provision, i.e., 21 U.S.C. §846. He had originally been indicted on 22 April 1996 on charges that he and a codefendant named Nelson had been in a conspiracy to distribute cocaine. On 4 November 1996, a superceding indictment was obtained alleging a 21 U.S.C. §846 conspiracy to distribute cocaine which allegedly began in "late April 1988 continuing to at least November 1991." That indictment stated that the date of the conclusion of the conspiracy was "unknown to the grand jury." The Manner and Means portion of the indictment alleged that the conspiracy continued from "1988

through 1993" and involved the distribution of cocaine in Pennsylvania, Maryland, Georgia, Illinois, and elsewhere (unspecified). It was alleged that Mr. Dickerson's role and agreement was to be a distributor of cocaine. He would allegedly receive the contraband, sell it in Maryland and pay his suppliers.

On 18 May 1998, Dickerson and two co-defendants, who were also alleged to be distributors, went to trial. One defendant, Richard Williams, agreed to plead guilty and cooperate with the government. Another defendant, Albert Nelson, was dismissed from the indictment by agreement of the government because of two prior convictions for drug distribution conspiracy in Georgia and South Carolina, respectively. Of the three defendants who went to trial, two, Mr. Randall and Mr. Bonds, were acquitted. Mr. Dickerson was convicted in a verdict returned on 1 June 1998.

On 15 January 1999, Mr. Dickerson filed a motion to dismiss the drug distribution conspiracy alleged in Count 1 of the Maryland indictment because, in light of the Florida conviction, it violated the double jeopardy clause of the United States Constitution. In response to that motion, the prosecution went to a different grand jury and obtained a second superceding indictment. The new grand jury was not told about the evidence and indictments that had previously been returned for a Maryland distribution conspiracy beginning on or about 1990. They were given evidence that arbitrarily chopped off the beginning date for the conspiracy and placed it "in or about 1992" and continuing to "on or about November 21, 1997." The remaining allegations regarding distributions in Maryland and "elsewhere" and the allegations involving individual unnamed co-conspirators who were "known and unknown"

were unchanged. After this strategic reindictment before this new grand jury, the prosecution, two days later, on 19 February 1999, filed its response to Mr. Dickerson's double jeopardy motion relying heavily on the artful, arbitrarily selected dates in the new indictment.

At the hearing on the Maryland motion to dismiss on double jeopardy grounds, both sides proceeded by proffer. The court was informed that Mr. Dickerson's named suppliers in the Florida indictment, Nelson and Hanks, were actually receiving their drugs from an unnamed co-conspirator, a Mr. Rodriquez. Rodriquez also supplied Florida co-conspirator Sears who had worked for Nelson and Hanks, until Hanks died in 1991, and who supplied Dickerson for a period of time from late 1993 going into early 1994. The cooperating individual named Blanks who had set up the sting operation in November 1997, had told the Baltimore federal grand jury that the only source of drugs for Mr. Dickerson was Florida. There was no evidence of any other source of drugs outside of Florida except for a single statement by Mr. Sears in which he alleged that he had once been told by Mr. Dickerson, in a past tense statement, that Mr. Dickerson had received drugs from New York. The amount or time frame is not stated or alleged. That statement about New York conflicted with the government's other witness Blanks and was not corroborated by any other evidence.

Blanks' involvement with Dickerson from 1990 to 1992, during the time frame of the Florida conspiracy, is also part of the prosecution's evidence for the Maryland trial, according to the prosecution, because it shows a "common scheme or plan." Blanks was also considered but was not used as a prosecution witness in Florida. He had originally been a courier and later became a purchaser and seller for Mr Dickerson in Mr.

Dickerson's Maryland distribution network. That Maryland distribution network was allegedly begun in the late 1980's, coincidental to the time frame of the Florida indictment. He allegedly distributed cocaine in the same state in both indictments. The two jurisdictions used different starting and ending dates but there is overlap in time, his locus of distribution is the same and the drug is the same in each indictment.

The Maryland conspiracy, as alleged by the prosecution in two Maryland indictments began in 1990 and continued to 1996. The Florida conspiracy allegedly began in 1988 and continued to 1993. One of the Florida conspirators, Mr Sears, was involved in distribution to Mr. Dickerson from Florida with cocaine from Rodriquez, the unnamed main source in the Florida case, for a period at the latter part of 1993 into the earlier part of 1994. The Maryland conspiracy ended in 1996 but for a single transaction in 1997. There were no transactions between December 1996 and November 1997 other than the sting orchestrated by the informant Blanks.

The actual distribution conspiracies, therefore, overlap for all but a year and a half. Mr. Dickerson's alleged criminal activity in both indictments involved his distribution of cocaine in Maryland which he obtained from Florida according to prosecution witnesses except for one witness who alleges that he was once told, in a passing remark, about a New York source. Whether or not that statement about New York was true is unknown but it is known that there is no corroboration from any place to support it, it is contradicted by another government witness and its duration and the quantities involved are not alleged.

The trial court denied the motion to dismiss but considered the double jeopardy issue of such significance that it allowed an interlocutory appeal. The Fourth Circuit Court of Appeals took the case on interlocutory appeal. The defense relied on a recent similar case within the circuit in which the defense had prevailed, United States v. Jarvis, 7 F.3d 404 (4th Cir. 1993), but the Fourth Circuit denied relief without addressing the Jarvis decision which was the most recent decision in that circuit on the issue.

A Petition for Rehearing with a Suggestion for Rehearing *En Banc* was denied on 14 April 2000.

## REASONS FOR GRANTING THE WRIT

This case presents an important and frequently occurring issue on which this Court has not ruled. Federal drug prosecutions account for a large segment of criminal prosecutions in the federal courts. A great deal of the district courts' criminal dockets are taken up with federal drug conspiracy cases. Given the nature of our society, modern travel, transportation, and communications, these conspiracies often involve activities in different federal circuits and different districts within and among the circuits. As a consequence of this recent development, all of the federal circuits have been faced with double jeopardy claims regarding successive prosecutions in different districts and different circuits for drug distribution conspiracies under 21 U.S.C. §846. When addressing these claims on appeal, the circuits are not uniform in their approach. There is a significant variance among the circuits which this Court ought to address. How a court approaches this issues is wholly dependant on where the court is geographically located.

## I. THE CIRCUIT COURTS OF APPEAL ARE DIVIDED ON HOW TO DETERMINE WHETHER SUCCESSIVE PROSECUTIONS FOR DRUG DISTRIBUTION CONSPIRACIES UNDER 21 U.S.C. § 846 VIOLATE THE DOUBLE JEOPARDY PROTECTIONS OF THE CONSTITUTION.

The Fifth Amendment guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Double Jeopardy Clause of the Fifth Amendment requires that, "all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction" be prosecuted in one proceeding, except in extremely limited circumstances. See Ashe v. Swenson, 397 U.S. 436, 453-454.

By decision of this Court it is settled that the prosecution of a single conspiracy as two separate conspiracies violates a defendant's double jeopardy guarantee. See, Braverman v. United States, 317 U.S. 49 (1942). It is also well settled in conspiracy law that it is the agreement which constitutes the crime. The essence of conspiracy is the agreement, the sine qua non of conspiracy. The Supreme Court decision, United States v. Felix, 503 U.S. 378 , 389-90 (1992) supports this principle. This Petition presents the issue of how the federal courts should determine claims of a double jeopardy violation in drug conspiracy cases where successive prosecutions have been brought. This issue needs to be resolved by this Court to give lower courts guidance and provide consistency within the circuits.

When answering the question of whether a single or multiple drug conspiracy exists for purposes of the double

jeopardy clause, some of the federal circuit courts have adopted a "totality of the circumstances" test. See United States v. Montgomery, 150 F.3d 983 (9th Cir. 1998); United States v. Stoddard, 111 F.3d 1450, 1454 (9th Cir. 1997); United States v. Jarvis, 7 F.3d 404 (4th Cir. 1993); United States v. Thorton, 972 F.2d 764 (7th Cir. 1992); United States v. Ragins, 840 F.2d 1184, 1191 (4th Cir. 1988); United States v. Korfant, 771 F.2d 660, 662 (2d. Cir. 1985); United States v. Castro, 629 F.2d 456 (7th Cir. 1980). Under this "totality of the circumstances" test, the federal circuit courts cited above have adopted five factors to consider when determining whether one agreement existed:

(1) the time periods in which the alleged activities of the conspiracy occurred;
(2) the statutory offenses charged in the indictments;
(3) the places where the alleged activities occurred;
(4) the persons acting as co-conspirators; and
(5) the overt acts or any other descriptions of the offenses charged which indicate the nature and scope of the activities to be prosecuted.

See, e.g., United States v. MacDougall, 790 F.2d 1135, 1144 (4th Cir. 1986).

In United States v. MacDougall, the Fourth Circuit was presented with the question of whether MacDougall's double jeopardy rights were violated by successive prosecutions for conspiracy to distribute drugs in violation of 21 U.S.C. § 846. MacDougall had been charged with conspiracy to distribute drugs in violation of 21 U.S.C. § 846 by an indictment in the District of South Carolina. Id. at 1137-38.

In the first indictment the charges against MacDougall were dismissed with prejudice. Id. at 1143. In the second indictment, MacDougall was charged with "violating the same conspiracy statutes" charged in the preceding indictment. At

trial on the second indictment in the same federal district court, MacDougall was convicted of conspiracy to possess with intent to distribute drugs in violation of 21 U.S.C. § 846 and other related charges. This conviction rested on the same statutory offenses charged in the prior indictment.

Prior to trial on the second indictment, MacDougall made a motion to dismiss the conspiracy counts on the ground that prosecution of the conspiracy charge in the second indictment was barred on double jeopardy grounds because the basis for the conspiracy was the same as in the prior indictment which had been dismissed with prejudice. The district court denied MacDougall's double jeopardy motion concluding that there were two separate distribution conspiracies rather than one single conspiracy. Id. at 1143.

In framing the question presented, the Fourth Circuit in MacDougall, began its analysis by stating that the "essence of our inquiry is whether the government has impermissibly divided a single conspiracy into two conspiracies by charging a violation of the conspiracy statute in two separate indictments." Id. at 1143-44. The Fourth Circuit then set forth the guiding principle that "the double jeopardy clause clearly prohibits the division of a single criminal conspiracy into multiple violations of a conspiracy statute. Id. at 1144 (citing United States v. Braverman, 317 U.S. 49 (1942)).

The Fourth Circuit in MacDougall, acknowledged that the traditional test used to determine double jeopardy violations where separate indictments charge the same offense is ordinarily the Blockburger "same evidence" test. See id. (citing Blockburger v. United States, 284 U.S. 299 (1932). The court in McDougall, however, acknowledged that the "same evidence" test is of limited value in the context of successive prosecutions for criminal conspiracy. MacDougall, 790 at 1144. The Fourth Circuit reasoned that the "same evidence" test in the

context of deciding double jeopardy violations where successive prosecutions are brought for criminal conspiracy is of limited value because prosecutors "could carefully draw two indictments by choosing different sets of overt acts and make one conspiracy appear to be two." Id. (citing, United States v. Thomas, 759 F.2d 659, 661 (8th Cir. 1985); United States v. Bendis, 681 F.2d 561, 564-65 (9th Cir. 1981). The Fourth Circuit, therefore, applied the "totality of the circumstances" test utilizing the five factors outlined above and stated that "a full study of the indictments and evidence" test, is a more accurate means for analysis than the "same evidence" test. MacDougall, 790 at 1144.

Upon consideration of the five-factor test, the Fourth Circuit in MacDougall, affirmed the district court's denial of MacDougall's motion to dismiss on double jeopardy grounds. On the facts of the case, that court determined that the cooperation between the members of the second charged conspiracy in the second indictment and those members of the first conspiracy charged in the first indictment was insufficient to link them into a single conspiratorial scheme. The court affirmed the district court's denial of MacDougall's motion to dismiss on double jeopardy grounds. See id. at 1144-45.

In its application of the five-factor test, the Fourth Circuit in MacDougall, emphasized two of the five factors to find two separate and distinct conspiracies rather than one. MacDougall, 790 F.2d at 1145. Those factors were: (1) identity of the persons acting as co-conspirators, and (2) the activities of the conspiracies charged in the several indictments. Id.. The court decided an overlap of eight defendants charged between each indictment out of a larger number of participants between the two indictments was not indicative of a single conspiracy. Id.. The court then stated that the most complex of the factors in their analysis was the significance of the extent of the joint ventures among the defendants in the two indictments. Id.. The

court found the existence of four joint ventures connecting the two indictments. Although the court found evidence which supported the cooperation, pooling of risk, and exchange of personnel over a long period of time, the court nonetheless found independent conspiracies. Id. at 1147. The court went on to state that even if the evidence or allegations showed that participants in a conspiracy charged in one indictment worked to further the conspiracy charged in the other indictment consistent with the achievement of the goals of the second indicted conspiracy that still did not preclude culpability for separate conspiracies. Id. (citing United States v. Ruggiero, 754 F.2d 927, 934 n. 13 (11th Cir.1985) (overt acts can be in furtherance of two conspiracies), United States v. Ingman, 541 F.2d 1329, 1331 (9th Cir.1976) (an action may be in furtherance of two or more conspiracies; even interrelationship between conspiracies does not make them the same criminal enterprise).

In its application of the five-factor test, the Fourth Circuit in MacDougall, addressed three factors in particular as not bearing much on the ultimate determination of whether there were one or more conspiracies. Id. 790 at 1147. The first, statutory offenses charged, the second, location of the activities, and third, their time periods. Id. Despite the court's finding that the two indictments charged the same statutory offenses, the court held this to be "not surprising and does not prevent the government from establishing the existence of separate conspiracies." Id.

With respect to the second of the remaining three factors, the court found that despite the finding that the two charged conspiracies cooperated and were both heavily involved in South Carolina, no single conspiracy existed because one of the conspiracies as charged in one indictment also operated along the east coast. Id. at 1148. Lastly, the court decided that the finding that there was substantial overlap in time between the conspiracies charged in each indictment, was of "minimal

relevance" to the court's analysis of the overlapping activities between the conspiracies. Id.

The Eighth Circuit also uses the "totality of the circumstances" test consisting of the five factors. United States v. Okolie, 3 F.2d 287 (8th Cir. 1993); United States v. McClelland, 62 F.3d 265 (8th Cir. 1995).

In McClelland, the Eighth Circuit upheld the district court's denial of a motion to dismiss a subsequent indictment on double jeopardy grounds. Id. at 265. In each indictment the defendant was charged with conspiracy to distribute controlled substances in violation of 21 U.S.C. § 846. Id. at 266. In determining whether the government had twice prosecuted defendant for a single long-term, narcotics conspiracy the court applied the five factors under the "totality of the circumstances" test. Id. at 267.

From 1987 to 1990, the defendant imported heroin from Hong Kong to St. Louis for redistribution. Id. at 267. He did this from jail. After his release he expanded his distribution network, changed sources and added cocaine to his business. Id. at 268. The court found that there was substantial overlap in the time during which the two conspiracies were alleged to have occurred. Id. at 267. The court further found that the same statutory offenses were charged. See id. at 268. The court, however, held there were two separate conspiracies. Id. at 268.

Under the identity of participants factor, the court found it significant that the persons identified in each indictment were different with the exception of one participant. Id. at 268. Under the statutory offenses charged factor, even though the court found the same statutory provisions were alleged to have been violated in each indictment, the court reasoned that different substances were named and considered this as a factor

weighing in favor of a finding of two separate conspiracies. Id. at 268. Under the "nature and scope of the activities charged" factor the court found two separate conspiracies, one to import heroin during a four year period from Hong Kong for distribution in St. Louis and another overlapping conspiracy spanning the course of fourteen years to distribute heroin and various other narcotics in St. Louis. Id. at 268. As a final factor the court considered the location of the acts in furtherance of the conspiracy. Here the court recognized that the conspiracies primarily involved St. Louis, however because some of the in the one indictment drugs were imported from Hong Kong two conspiracies existed.

The Fifth Circuit, has also adopted use of the "totality of the circumstances" test and the five factor analysis. United States v. Marable, 578 F.2d 151 (5th Cir. 1978). Marable was convicted of conspiring to possess cocaine with intent to distribute it, in violation of 21 U.S.C. § 846. Id. at 152. Following his conviction, Marable was again indicted for violating the conspiracy provision of 21 U.S.C. § 846. Id. at 152.

When considering Marable's double jeopardy claim the court recognized that prosecutions under this statute present an even greater need for defining the scope of a conspiracy. Id. at 153. Thus, the court reasoned, a greater need for an examination of the record exists in the context of successive drug distribution conspiracies under 21 U.S.C. § 846 than might apply to prosecutions under the general conspiracy statutes as 18 U.S.C. § 371, because the government need not prove an overt act in furtherance of the conspiracy to support a conviction. Id. at 154. To allow the prosecution to carve out individual acts to create separate indictments would mean that many single drug conspiracies could easily be artificially broken into separate prosecutions because they involve a series of individual events (even if part of one overall agreement) which

could easily serve as the basis for artfully pleading several separate prosecutions. This would enable the government to bring multiple conspiracy prosecutions from an otherwise single agreement.

In Marable, under the five factor test, the Fifth Circuit found that (1) the time frames were nearly identical. Id. at 154. Under the indictments, the conspiracy alleged at the first trial began on or about July 14, 1976, and continued until on or about August 20, 1976. The conspiracy alleged in the second indictment covering the period of "from on or about July 12, 1976, and continuing thereafter until on or about July 29, 1976. (2) The court also found that the participants on whom the first conviction relied were the same for the second with the exception of a couple of participants. Id. at 154. (3) The same statutes were alleged to have been violated, namely, 21 U.S.C. § 846. (4) The only distinction between the two convictions was the fact that the one conspiracy for which Marable was convicted involved cocaine and the second involved heroin. Id. at 154. (5) when the crucial events were drawn together and overlaid, the relationship between the overt acts alleged in the indictments showed a composite narrative of a single drug distribution conspiracy, such as simultaneous negotiations for finding sources of both cocaine and heroin. Id. at 156.

In Marable, the court framed the question presented as whether the evidence in the case then on appeal described a single agreement to deal broadly in drugs or whether the evidence described two conspiracies, one to deal in cocaine, the other to deal in heroin, sufficiently discreet that separate prosecutions did not violate the double jeopardy clause. Using the five factor test, that court decided that the government had merely described the same conspiracy in two different ways rather than one and that this violated Marable's double jeopardy rights. Id. at 156. Contrast this with the opposite result on somewhat similar facts reached by the Eighth Circuit in

MacClelland, supra.

Other circuits follow a different course and have a different approach to analyzing double jeopardy claims in successive drug conspiracy prosecutions.

The United States Court of Appeals for the Third Circuit has rejected the five factor analysis adopted by some of the circuit courts. See, United States v. Liotard, 817 F.2d 1074 (1987), citing, United States v. MacDougall, 790 F.2d 1135, 1144 (4th Cir. 1986). In Liotard, the Third Circuit recognized that a "multi-pronged 'totality of the circumstances' analysis is preferable to the 'same evidence' test for evaluating the merits of a conspiracy defendant's double jeopardy claim.." Id. at 1078. The court looked at the fact that the "totality of the circumstances" test adopted by the second, fourth, fifth, sixth and eighth circuits, included as one of the five factors the statutory offenses charged in the indictments when determining whether one or more conspiracies exist. See, Liotard at n. 7. The Third Circuit was not persuaded about this factor, however, and declined to follow the approach followed by the Second, Fourth, Fifth, Sixth and Eighth circuits. They concluded that consideration of this factor might lead to irrational results in cases where different statutes are violated by similar acts.

In Liotard the Third Circuit explained that the charges brought against Liotard in the two indictments, one re Pittsburgh, Pennsylvania and the other re Elmer, New Jersey, differed "not because of the substance of the violations, but because of the interstate nature of the acts" alleged in the first indictment and the intrastate nature of the acts alleged in the second indictment. Id. The court found that the difference between the two indictments was in the alleged overt acts, or the interstate nature of the acts alleged in the Pittsburgh indictment and the intrastate acts alleged in the New Jersey indictment. Id. The danger on which this circuit focused was

successive indictments against a single defendant who has participated in but one continuous conspiracy and who may be twice tried and punished for the same offense "if the court places undue emphasis upon the evidence used to prove the commission of the two overt acts alleged."

Contrary to both the Third Circuit and the majority of federal circuits cited above (Second, Fourth, Seventh, and Eighth) which have adopted the use of all five factors under the "totality of the circumstances" test, the Tenth Circuit has rejected the "totality of the circumstances" test all together and adheres to the "same evidence test"set forth in Blockburger v. United States, 284 U.S. 299 (1932). In United States v. Rodriguez-Moreno, 2000 WL 504858 (10th Cir. 2000), the Tenth Circuit upheld an Oklahoma district court's denial of a motion to dismiss using the "same evidence" test where defendant Rodriguez was indicted in Oklahoma after an acquittal in a Texas federal district court for, conspiracy to knowingly and intentionally possess with intent to distribute more than 1,000 kilograms of marijuana, in violation of 21 U.S.C. § 846. Id. at 1.

When Rodriguez was charged in an Oklahoma indictment with conspiracy to possess with intent to distribute in excess of 1,000 kilograms of marijuana, in violation of 21 U.S.C. § 846, he moved to dismiss the indictment arguing that the Oklahoma prosecution was barred by the double jeopardy clause of the Fifth Amendment because of the Texas acquittal. Id. at 3. The Oklahoma district court denied Rodriguez's motion to dismiss and upon trial by a jury Rodriguez was convicted. Id. at 1.

On appeal, Rodriguez asked the Tenth Circuit to apply a "totality of the circumstances" test to his double jeopardy claim. Id. at 3. However, the Tenth Circuit expressly declined to follow the "totality of the circumstances" holding that it

would continue to follow the "same evidence" test set forth in Blockburger v. United States, 284 U.S. 299 (1932) to determine whether two criminal conspiracy prosecutions violate the double jeopardy clause. Id. at 3. The Blockburger "same evidence" test provides that offenses charged are identical in fact only if the facts alleged in one would sustain a conviction if offered in support of the other. In affirming the district court's denial of Rodriguez's motion to dismiss, the Tenth Circuit held "without deciding whether there existed one or two conspiracies, it is clear that the same evidence would not be sufficient to support both inquiries" into whether there existed two separate conspiracies. Rodriguez, 2000 WL 504858 Id. at 3.

When resolving double jeopardy claims where successive prosecutions have been brought for drug distribution conspiracies in the Tenth Circuit the inquiry is "whether the two transactions were interdependent and whether the Defendants were united in a common unlawful goal or purpose." Rodriguez, 2000 WL 504858 . Id. at 3. The Tenth Circuit's means of analysis hinges on a determination of "interdependence." The Tenth Circuit described "interdependence" as being activities of alleged co-conspirators in one aspect of the charged scheme which are necessary or advantageous to the success of the activities performed by co-conspirators charged in the other another conspiracy. Rodriguez, 2000 WL 504858. Id. at 4. The Tenth Circuit, based on the record before them, without conducting the five factor analysis affirmed the district court's decision that two conspiracies existed using this "interdependent" analysis test.

The danger of continuing to use the "same evidence" test as the method of analysis in determining whether successive prosecutions for drug distribution conspiracies under 21 U.S.C. § 846 violates the double jeopardy protections of the United States Constitution is manifest. In a single drug distribution conspiracy the government often has many overt acts and co-

conspirators from which to choose when framing an indictment. The government is therefore able to choose one set of overt acts, or facts to use in one indictment and another set of overt acts, or facts to use in a subsequent indictment. The result is the outward appearance of two separate agreements, artificially represented by the selected transactions. In such cases the "same evidence" test will clearly fail to safeguard against an actual double jeopardy violation. Regardless if whether this test on the Third Circuit's test or the five factor totality of the circumstances test is used, there ought to be uniformity and there is not.

Conflicting with the Third Circuit; Tenth Circuit and the Second, Fourth, Seventh and Eighth Circuits, is the District of Columbia Circuit.

In United States v. Tarantino, 846 F.2d 1384, 269 U.S. App. D.C. 398 (1988), the D.C. Circuit, contrary to other decisions analyzing the single versus multiple agreement inquiry used a chain metaphor. The Circuit stated that under its analysis "a single conspiracy is established if the evidence establishes that each conspirator had the specific intent to further the common unlawful objective," citing, United States v. Ras, 713 F.2d 311, 314 (7th Cir. 1983). In drug distribution conspiracy case, the D.C. Circuit stated that "each link in the chain may rely upon other links in furtherance of the common interest. The street dealer relies upon his supplier; the supplier relies upon his supplier; and so on." Tarantino, 846 F.2d at 1392-93, 269 U.S. App. D.C. at 406-07. The Tarantino Court stated that the "vertically integrated, loose knit combination" raises an inference that "each conspirator has agreed with the others (some whose specific identity may be unknown) to further a common unlawful objective, e.g., the distribution of narcotics." Tarantino, 846 F.2d at 1393, 269 U.S. App. D.C. at 407.

In addition to its use of the chain and wheel analysis, the D.C. Circuit essentially outlines three additional factors to which it attaches varying degrees of importance. In its analysis the D.C.. Circuit discussed these three factors as a general rule of analysis. Id. at 1393.

In particular, the D.C. Circuit in Tarantino considers (1) whether the conspirators share a common goal (the most important), such as the possession and distribution of narcotics for profit, citing, United States v. Carporale, 806 F.2d 1487, 1500 (11th Cir. 1986), cert. denied, 483 U.S. 1021, 107 S.Ct. 3265, 97 L.Ed.2d 763 (1987);United States v. Dickey, 736 F.2d 571, 582 (10th Cir. 1984), cert. denied, 469 U.S. 1188, 105 S.Ct. 957, 83 L.Ed.2d 964 (1985); (2) the degree of dependence inherent in the conspiracy, citing, United States v. Cerro, 775 F.2d 908, 914 (7th Cir. 1985); United States v. Adamo, 742 F.2d 927, 932-33 (6th Cir. 1984), cert. denied, 469 U.S. 1193, 105 S.Ct. 971, 83 L.Ed. 2d 975 (1985); and (3) the overlap of participants in the various operations claimed to comprise a single conspiracy (a factor of lesser significance), citing, Caporale, 806 F.2d at 1500. Id., 846 F.2d at 1393, Id. 269 U.S. App. D.C. at 407.

This "chain" analysis is the opposite of the Seventh Circuit in United States v. Castro, 629 F.2d 456 (7th Cir. 1980), which held that whether the facts suggest either a wheel or a chain conspiracy is irrelevant. The three additional factors also differ from the five factor test of many other circuits cited above and to the four factor analysis utilized by the Third and the Blockburger test used by the Tenth.

## II. DRUG DISTRIBUTION CONSPIRACY PROSECUTIONS OCCUPY A GREAT DEAL OF THE FEDERAL COURTS' DOCKETS. THIS COURT HAS NOT RULED ON THE APPLICATION OF THE DOUBLE JEOPARDY PROTECTIONS TO DRUG CONSPIRACIES AND OUGHT TO RESOLVE CONFLICTS AMONG THE CIRCUITS

Federal drug prosecutions account for a large segment of criminal prosecutions in the federal courts. A great deal of the district courts' criminal dockets are taken up with federal drug conspiracy cases. Given the nature of our society, modern travel, transportation and communications, these conspiracies often involve activities in different federal circuits and different districts within and among the circuits. As a consequence of this, all of the federal circuits have been faced with double jeopardy claims regarding successive prosecutions in different districts and different circuits for drug distribution conspiracies under 21 U.S.C. §846.

When addressing these double jeopardy claims on appeal, the circuits are using different means of analysis to determine whether successive prosecutions are actually being brought for a single drug distribution conspiracy. The Supreme Court has not ruled on this precise issue since this Court's decision in Braverman v. United States 1942, 317 U.S. 49.

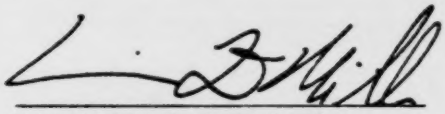
All but a few of the federal circuit court cases cited in this petition were decided after 1989. These cases illustrate how the federal circuits have differed when dealing with the issue presented in this petition of how to decide a defendant's double jeopardy claim in the context of successive prosecutions for drug distribution conspiracy. The case presented by this petition properly raises this issue and the Supreme Court of the United States ought to resolve this conflict.

The closest this Court has come to addressing this issue was in the case of United States v. Broce, 488 U.S. 563 (1989). In that case, the issue of double jeopardy in a continuing conspiracy was presented but it had not been preserved in the lower court Because it was not properly before this Court, no decision was reached on the double jeopardy claim that the defendant faced multiple prosecutions for one single conspiracy. The dissent in that case recognized that it was an important federal question and discussed how the various circuit courts of appeals address it. Id. at 585. They did not, however, have a Supreme Court case that they could cite that was authoritative on the issue. This case presents that issue for this Court and this Court is invited to accept this Petition and decide this question of how the courts should decide double jeopardy claims in multiple prosecutions for drug conspiracies.

## CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgement and opinion of the Court of Appeals in this matter.

Respectfully Submitted,



MARVIN D. MILLER
Attorney for Petitioner

DATED: July 12, 2000.

**UNPUBLISHED**

# UNITED STATES COURT OF APPEALS

## FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

v.

FRANK DEMETRIC DICKERSON, JR.,
a/k/a Frankie D, a/k/a Frank Dixon,
*Defendant-Appellant.*

No. 99-4259

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Benson E. Legg, District Judge.
(CR-97-410)

Argued: September 22, 1999

Decided: February 7, 2000

Before WIDENER and NIEMEYER, Circuit Judges, and
James H. MICHAEL, Jr., Senior United States District Judge
for the Western District of Virginia, sitting by designation.

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Affirmed by unpublished per curiam opinion.

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## COUNSEL

**ARGUED:** Kenneth Wendell Ravenell, SCHULMAN, TREEM, KAMINKOW, GILDEN & RAVENELL, L.L.C., Baltimore, Maryland, for Appellant. Christine Manuelian, Assistant United States Attorney, Baltimore, Maryland, for Appellee. **ON BRIEF:** Harry Levy, SCHULMAN, TREEM, KAMINKOW, GILDEN & RAVE-

NELL, L.L.C., Baltimore, Maryland, for Appellant. Lynne A. Battaglia, United States Attorney, Baltimore, Maryland, for Appellee.

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Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

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## OPINION

PER CURIAM:

A federal grand jury in the District of Maryland initially indicted Frank Dickerson on November 5, 1997 on one count of conspiracy to distribute and to possess with intent to distribute cocaine and cocaine base, and one count of distribution of cocaine, in violation of 21 U.S.C. §§ 846 and 841(a)(1). The government subsequently moved to supersede the Maryland indictment on February 11, 1998 to include a substantive count relating to the appellant's possession of a kilogram of cocaine on the date of his arrest. On January 15, 1999, the appellant filed a motion to dismiss count one of the superseding Maryland indictment on double jeopardy grounds. On February 17, 1999, a second superseding indictment was returned, narrowing the time frame of the charged conspiracy, but leaving unaltered the substantive counts. The district court denied the appellant's double jeopardy challenge, finding that the Florida and Maryland conspiracies were "sufficiently separate in objectives, personnel and other circumstances," and thus, could be separately indicted and prosecuted. Jurisdiction is invoked pursuant to 18 U.S.C. § 3231. After carefully considering the record in this case, the briefs, and the parties' argument, this court affirms the district court's ruling.

### I.

### A. *The Conspiracies*

Previously, a federal grand jury in the Southern District of Florida indicted the appellant on a charge of conspiracy to possess with intent

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to distribute cocaine in violation of 21 U.S.C. § 841. The Florida indictment was subsequently superseded on November 4, 1996 to include a charge of money laundering and a criminal forfeiture count against the five defendants. Initially, Albert Nelson, Jr.,[1] was the source of cocaine supply for the organization. James Hanks, who passed away in October 1991, replaced Nelson after Nelson was arrested in another state. Richard Williams was the main courier for the Nelson organization; and Frank Dickerson, Robert Randall, and John Bonds were the primary customers. The Florida indictment charged that from April 1988 through November 1991, Nelson's organization distributed hundreds of kilograms of cocaine out of Miami, Florida, to customers in Georgia, Illinois, Maryland, and Pennsylvania.[2] In prosecuting the Florida indictment, the government did not concentrate on how the customers distributed the cocaine following its interstate transport.

[1]On March 23, 1990, Nelson was arrested on a federal indictment in Savannah, Georgia, charging him with conspiring to distribute drugs in Georgia between 1984 and 1989. Following his arrest, Nelson cooperated with federal authorities and subsequently plead guilty to the Georgia drug charge in May 1992. However, Nelson continued to engage in drug trafficking from his jail cell in Georgia. Consequently, in May 1995, while on supervised release, Nelson was indicted in the District of South Carolina. The indictment encompassed the distribution by Nelsons Miami-based organization of multi-kilogram quantities of cocaine to individuals in South Carolina between 1988 and 1995 via the same courier, Richard Williams. Nelson subsequently moved to dismiss the South Carolina indictment as a violation of double jeopardy on the grounds that the Georgia conspiracy and the South Carolina conspiracy were one and the same. On interlocutory appeal, this court upheld the district court's denial of the motion in *United States v. Nelson*, No. 95-5706, 1996 WL 460280 (4th Cir. August 14, 1996) (per curiam). The District Court of South Carolina convicted Nelson on the money laundering and conspiracy charges and sentenced him to a term of life imprisonment. As a result of Nelson's sentence in South Carolina, the U.S. Attorney's Office for the Southern District of Florida dismissed its indictment against him and proceeded to trial with the remaining defendants: Dickerson, Randall, and Bonds.

[2]On June 9, 1998, a jury convicted Dickerson on the Florida conspiracy charge; Randall and Bonds were acquitted. Dickerson was sentenced in Miami on November 20, 1998 to a term of 240 months imprisonment for the Florida conspiracy.

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Prior to and during the time period that the appellant was being investigated for his participation in the Nelson organization, the Baltimore District Office of the Drug Enforcement Administration ("DEA"), was conducting a separate investigation of Frank Dickerson and his narcotics trafficking activities on the Eastern Shore of Maryland. Through interviews with a number of confidential informants and cooperating witnesses, the DEA learned that beginning in the late 1980s, the appellant set up his own multi-kilogram distribution organization serving customers in Maryland and Virginia. The Maryland indictment centers on the appellant's distribution network on the Eastern Shore.

While the appellant was on pretrial release from the Florida charges, the DEA amassed evidence that he continued to engage in drug trafficking in Maryland. A federal grand jury initially returned a two count sealed indictment issued by the United States District Court for the District of Maryland on November 5, 1997 charging the appellant with a drug conspiracy spanning the time frame between 1990 and 1996, and with distribution of a half-kilogram of cocaine to confidential informant Richard Blanks on or about December 28, 1996. On February 11, 1998, prior to the resolution of the Florida indictment, the Maryland indictment was superseded to extend the time period of the charged conspiracy to November 21, 1997 and to include one count of possession with intent to distribute the kilogram of cocaine found in the appellant's briefcase on the day of his arrest. Unlike the Florida indictment, Dickerson is the only defendant named in the Maryland indictment.

### B. *Time*

The Florida indictment charges that the Nelson organization began in 1988 and continued until November 1991. The evidence presented at the appellant's trial in Florida established that he began receiving multi-kilogram shipments of cocaine from Nelson and his Miami-based organization in late September 1988. The organizations courier, Richard Williams, transported the cocaine to the appellant in Philadelphia, Pennsylvania. Williams continued to deliver cocaine to the appellant in this manner until May 1990. At this time, James Hanks replaced Nelson as the source of cocaine supply because Nelson was arrested on the Georgia indictment. From that point on, Williams

made his cocaine deliveries to the appellant in Greenbelt, Maryland. The last delivery of the organization's cocaine to Dickerson and Bonds occurred in August 1991. Randall received his last shipment consisting of five kilograms of cocaine from the organization on November 21, 1991. These five kilograms constituted the residual amount of cocaine left in the organization following Hankss death in October 1991.

The original and superseding Maryland indictments charged that the Maryland conspiracy began in 1990. This was based, in part, upon information received from confidential informant Blanks that he had made cocaine deliveries for the appellant to the appellant's customers in Virginia beginning sometime in 1990 and continuing up through May 1992, at which time he stopped working for the appellant. Their drug relationship resumed a few months later and continued until the appellant's arrest in November 1997. On February 17, 1999, after the appellant filed his double jeopardy challenge, the Maryland indictment was superseded for a second time to narrow the scope of the charged conspiracy to the period beginning in 1992 after the end of the Florida conspiracy, and concluding on the day of the appellant's arrest on November 21, 1997.

### C. *Commonality between the Conspiracies*

In examining the fact patterns shown in relation to the Florida indictment, and the purported fact pattern underlying the Maryland indictment, there are shown to be common players who participated in both the Maryland and Florida organizations. However, there are just as many individuals who were only involved in only one of the operations. For instance, co-defendant Robert Randall began receiving multi-kilogram deliveries in Georgia from the Nelson organization in 1990. Additionally, in April or May 1991, Nathaniel Kirkland accompanied Williams when delivering cocaine to Randall and Dickerson in Georgia and Maryland, respectively. Around this same time, the organization took on multi-kilogram customer John Bonds, who accepted delivery of his cocaine in Chicago from Williams and Kirkland. However, there is no evidence that any of these individuals continued associating with the appellant beyond the demise of the Nelson organization in 1991.

Similarly, Troy Perkins and Jimmy Jones were among the appellant's sizable customers after 1990. Perkins obtained multiple-kilogram quantities of cocaine from the appellant beginning in 1990 and extending through 1994. Jones's drug relationship with the appellant began around the same time as Perkins's; however, Jones's relationship continued until 1996 when the government made a controlled purchase of cocaine from Jones believed to have been supplied by the appellant. Both Perkins and Jones distributed the appellant's cocaine to their own customers in Maryland and Jones further distributed to Delaware. There is no evidence that either customer was affiliated with the Nelson conspiracy or was affected negatively by its fall.

Further, Robert Jackson, the appellant's courier, was also involved solely in the Maryland conspiracy. The only evidence linking him to the Nelson organization is that at the time of his arrest, Jackson was driving a Cadillac El Dorado with a secret compartment to hide the drugs. This vehicle initially belonged to Nelson, but subsequently the appellant obtained it for use in his own organization.

There is some overlap of personnel between the two conspiracies. For example, Mark Sears ran the stash house in Miami where the Nelson organization's money and cocaine were stored. On occasion, he also accompanied Richard Williams on cocaine deliveries to the organization's customers. His active participation in the Florida conspiracy effectively ended sometime around June 1990, shortly after Hanks took over, at which point he branched out on his own and eventually began distributing multi-kilograms of cocaine to a customer in North Carolina.

After the end of the Florida conspiracy, Sears employed members of the operation to help him with his new business. He hired Richard Williams, the main courier for the Nelson organization, to make two cocaine deliveries to North Carolina. Sears also hired Henry Nathan Johnson to work for him as a drug courier to transport cocaine to North Carolina. Johnson, who was Albert Nelson's cousin, previously transported drug proceeds between Atlanta and Miami for Nelson.

Sears maintained his relationship with the appellant on a social basis after Hanks took over Nelson's organization around May 1990. In or about 1992, the appellant advised Sears that he was obtaining

kilogram quantities of cocaine from sources in New York. However, in 1993, for a period of approximately six months extending into 1994, the appellant began utilizing Sears, who was still living in Miami, as a source for multiple kilograms of cocaine. Sears obtained this cocaine from an individual named Vincente Rodriguez. Sears knew Rodriguez to have been one of the sources of supply for Albert Nelson.

II.

The Double Jeopardy Clause of the Fifth Amendment provides that no one shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. This clause precludes successive prosecutions for the same offense, and thus, forbids "the division of a single conspiracy into multiple violations of a conspiracy statute." *United States v. MacDougall*, 790 F.2d 1135, 1144 (4th Cir. 1986). The Fourth Circuit has adopted a "totality of the circumstances" test for determining whether successive conspiracy charges violate the Double Jeopardy Clause. *See id.* Under this test, the factors for a court to consider include:

> (1) time periods in which the alleged activities of the conspiracy occurred; (2) the statutory offenses charged in the indictments; (3) the places where the alleged activities occurred; (4) the persons acting as co-conspirators; and (5) the overt acts or any other descriptions of the offenses charged which indicate the nature and scope of the activities to be prosecuted.

*Id.* Courts should refrain from applying these factors rigidly in determining whether different conspiracy counts charge the same offense. *See United States v. McHan*, 966 F.2d 134, 137 (4th Cir. 1992). Rather, courts should apply these factors flexibly as the import of each factor may vary from case to case. *See id.* Additionally, other characteristics of the conspiracy may be relevant in determining how many conspiracies exist. *See id.* Thus, no precise mathematical equation exists to determine whether an appellant is in danger of being tried twice for the same conspiracy.

Initially, the burden of raising a double jeopardy claim lies with the defendant. *See United States v. Ragins*, 840 F.2d 1184, 1191 (4th Cir.

1988). Once the defendant makes a non-frivolous showing that he is in jeopardy of twice being prosecuted for the same offense, the burden then shifts to the government to prove by a preponderance of the evidence that two separate and distinct conspiracies actually existed. *See id.* at 1192. Upon reviewing a district court's finding regarding a double jeopardy claim, the court's factual determinations are reviewed under a clearly erroneous standard and its legal conclusions are reviewed de novo. *See McHan*, 966 F.2d at 138.

A. *Time*

The Florida indictment involves behavior beginning on or about late April 1988 and continuing to November 1991. The initial Maryland indictment involves behavior beginning in or about 1990 and continuing until December 1996. However, the United States changed the time frame in the second superseding Maryland indictment to involve behavior beginning in or about 1992 and continuing to November 1997.

The appellant alleges that the time periods of the Florida and Maryland conspiracies overlap; thus the argument goes, the two indictments charge unlawful acts within the same conspiracy. Further, the appellant contends that the United States attempted to conceal the duration of this overlap by indicating that the start date of the Maryland conspiracy was in 1992 in the second superceding indictment. Whereas a partial overlap may indicate that only one conspiracy existed, it does not necessarily require a court to find that a defendant's unlawful acts arose from only one conspiracy. *See United States v. Hoyte*, 51 F.3d 1239, 1246 (4th Cir. 1994); *MacDougall*, 790 F.2d at 1147. The partial overlap here is particularly applicable in this case because the Maryland conspiracy continued for a period of six years beyond the expiration of the Florida conspiracy and encompassed substantive acts occurring after the appellant's indictment, arrest, and release in the Florida conspiracy. *See United States v. Nelson*, No. 95-5706, 1996 WL 460280, at *3 (4th Cir. Aug. 14, 1996) (per curiam); *see also United States v. Ledon*, 49 F.3d 457, 460 (8th Cir. 1995) (finding two conspiracies existed when the second conspiracy continued three and a half years after the end of the first conspiracy); *United States v. Okolie*, 3 F3d 287, 290 (8th Cir. 1993) (holding the continuation of the second conspiracy eight months after

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the end of the first is "indicative of a separate and ongoing agreement").

The Florida indictment charges that the conspiracy expired in November 1991. There is no evidence indicating that the appellant continued his relations with the Florida conspiracy after the demise of James Hanks in 1991. Additionally, it appears from Nelson's prosecution in South Carolina that Nelson shifted his operation to that state around the same time. *See Nelson*, 1996 WL 460280. The fact that the cardinal suppliers exited the organization in some manner in 1991 suggests that the Florida conspiracy dissolved at this time. The appellant was arrested based on the Florida indictment on May 8, 1996. He was released on an unsecured personal surety bond. While on pretrial release, the appellant continued to engage in drug trafficking in Maryland until his arrest under the Maryland indictment on November 21, 1997. Because the Maryland conspiracy included acts that extended beyond the appellant's indictment, arrest and release in the Florida conspiracy, this factor supports a conclusion that two separate conspiracies existed.

### B. *Geographical Location*

The appellant's involvement in the Florida indictment charges that the conspirators obtained cocaine from South Florida suppliers, which would then be distributed to Pennsylvania, Maryland, Georgia, Illinois, and elsewhere. The Maryland indictment charges the appellant with illegal activities occurring in Maryland and elsewhere. Because both indictments charge the appellant with conspiring to distribute drugs in Maryland, the appellant maintains that the United States is prosecuting him for unlawful acts within the same conspiracy.

In *MacDougall*, this court recognized that two different conspiracies may have similar geographic regions. In that case, both conspiracies were heavily involved in the same state and utilized a few of the same locations for off-loading imported drugs. *See MacDougall*, 790 F.2d at 1148. However, the conspiracies generally maintained different off-load locations and one conspiracy operated more extensively along the east coast than the other conspiracy. *See id.* As a result of these differences, the court found that two conspiracies existed.

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Similar to *MacDougall*, while there are some similarities between the Florida and Maryland conspiracies regarding geography, there are also several differences. During the Florida conspiracy, the appellant received drugs at either Philadelphia, Pennsylvania or Greenbelt, Maryland. Shipments made to either Philadelphia or Greenbelt derived from Miami, Florida. In contrast, during the Maryland conspiracy the appellant largely was receiving kilogram quantities of cocaine from New York. Indeed, some shipments did arrive from Florida via Sears during the Maryland conspiracy. However, this arrangement was maintained for only six months and the conspiracy existed for five years. For the most part, the origin of the cocaine substantially differed. Further, while Dickerson set up his own multi-kilogram distribution organization in Maryland and Virginia during the late 1980's, in the early 1990's he began selling crack cocaine for distribution on the Eastern Shore of Maryland and Delaware. Thus, there are enough differences in the geographic areas to strengthen the conclusion that two separate conspiracies existed.

### C. *Similar Co-conspirators*

In comparing the two indictments, the only individual named in both is the appellant, Frank Dickerson. The appellant alleges that the same people who engaged in the Florida conspiracy also had roles in the Maryland conspiracy, and thus, the court should look beyond the mere names on the indictments. Indeed, there appears to be several individuals who participated in some fashion in both conspiracies. However, even if the same individuals were participants in both conspiracies, when their roles differ such that the organizational structure is altered, the court is not required to find only one conspiracy existed. *See McHan*, 966 F.2d at 138. In *McHan*, essentially the same individuals participated in two distinct conspiracies. During the first conspiracy, McHan and his co-conspirator, Posey, would alternate buying marijuana in Texas. *See id.* Posey would then transport the contraband to North Carolina where the two would divide it in half. Posey sold to one specified buyer while McHan sold to another. *See id.* In the second conspiracy, Posey's only role involved introducing McHan to his source of drug supply. *See id.* Further, the buyers in the original conspiracy did not participate in the second conspiracy. *See id.* at 139. Although both McHan and Posey participated in both con-

spiracies, because of the change in their roles, this court upheld the district court's finding that two separate conspiracies existed. *See id.*

As in *McHan*, several participants in the Florida conspiracy were also involved in the Maryland conspiracy. Mark Sears was involved in both conspiracies, but in different capacities. In the Florida conspiracy he ran Nelson's stash house in Miami and occasionally accompanied a courier to deliver cocaine to the organization's customers. He terminated his involvement with this conspiracy some time around June 1990. At that time, he endeavored to start his own multi-kilogram distribution network to North Carolina. Sears maintained a social relationship with the appellant for several years, but then in 1993, he began supplying the appellant with shipments of cocaine for approximately six months. Richard Blanks was also involved in both conspiracies. However, his role evolved from a courier in the Florida conspiracy to a purchaser in the Maryland conspiracy.[3] Henry Nathan Johnson, Albert Nelson's cousin, also participated to a certain extent in both conspiracies. In the Florida conspiracy, Johnson primarily transported proceeds between Miami and Atlanta for Nelson. After Nelson's arrest, Sears hired Johnson to transport cocaine to North Carolina and elsewhere. Thus, during the short time that Sears supplied the appellant, Johnson was the courier. Similar to *McHan*, the Florida and Maryland conspiracies may have shared the same participants. However, because most of the co-conspirators's roles evolved during the course of the Maryland conspiracy, this factor again strengthens the conclusion that two separate conspiracies existed.

Further, except for the appellant, the shared comrades of the conspiracies were not the principal participants. Rather than consider all of the participants involved between the conspiracies, a more accurate method for determining whether one or two conspiracies exist is to consider the principal players. *See Nelson*, 1996 WL 460280, at *4. The substantive players generally include the suppliers, contacts, and buyers. *See id.* The suppliers in the Florida case were Nelson and Hanks. In Maryland, Sears and an unknown source from New York

[3]There appears to be one isolated event in which Mr. Blanks performed a favor to the appellant by delivering drugs to another purchaser. However, his general role in the Maryland conspiracy was that of a buyer.

supplied the appellant with cocaine. The buyers in the Florida conspiracy were the appellant, Randall, and Bonds. The prosecutors for the Florida conspiracy did not extend their investigation beyond the principal buyers. In the Maryland conspiracy, the appellant established regular buyers such as Troy Perkins and Jimmie Jones. Thus, because the principals differed between the Florida and Maryland conspiracy, the existence of two conspiracies is likewise strengthened.

### D. *Overt Acts*

The appellant also alleges that the wording of the indictments charging the appellant with conspiring to distribute cocaine is indicative of the existence of only one conspiracy. The court is unable to compare the overt acts specified in the indictments because only the Florida indictment details these acts. Instead, the Maryland indictment broadly charges the appellant with cocaine distribution activities. However, the court can consider the conspiracies' joint ventures in drug trafficking. *See MacDougall*, 790 F.2d at 1145. If a pattern of mutual cooperation throughout the participating individuals exists along with an interdependence between the organizations, then it is more likely that there was only one conspiracy. *See id.* at 1146.

There was a brief period of time in the early 1990's when the appellant was purchasing drugs from the Florida conspiracy and selling them to his primary buyers in the Maryland conspiracy. However, these buyers continued to purchase drugs from the appellant after the dissolution of the Florida conspiracy, denoting that no interdependence was prevalent between the two organizations because their ability to buy drugs from the appellant was not hindered. Additionally, the Florida indictment specified overt acts that would be proven at trial. This evidence included illegal acts that the appellant committed between 1988 and 1991. The government proffers that at the Maryland trial, the evidence that will be admitted relates to the appellant's drug trafficking business after 1992. Thus, the appellant would not be convicted for the same overt acts because of the time lag between the allegations. This time lag, perhaps of most importance in this matrix, likewise is strongly indicative of the existence of two conspiracies.

### E. *Substantive Statutes*

The statutory offenses in the two indictments are identical. Both indictments charge the appellant with violating 21 U.S.C. § 841.

However, this coincidence . . . not mandate a finding of one conspiracy because it is conceivable that two distinct conspiracies commit exactly the same kind of crime. *See United States v. Ledon*, 49 F.3d 457, 460 (11th Cir. 1995) (recognizing that "the statutory offenses charged are the same, but in context with the other factors, this is a minor point, since one can certainly enter two conspiracies to commit the same type of crime"). This is particularly true when one indictment charges specific acts and the other broadly charges conspiracy and cocaine distribution activities. *See United States v. Nino*, 967 F2d 1508, 1512 (11th Cir. 1992). Thus, the fact that both indictments charge the appellant with the same statutory offense is a minor similarity compared to the other factors. In considering each of the above factors, and their cumulative effect, it is clear that the court below did not err in determining the appellant was involved in two separate and distinct conspiracies.

III.

The court concludes that the district judge was not in clear error in determining that the appellant engaged in two distinct and separate conspiracies. Consequentially, the appellant's claim of a double jeopardy violation fails and the United States may prosecute the appellant on the Maryland indictment. The district court's decision is

*AFFIRMED.*

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
April 14, 2000

No. 99-4259
CR-97-410

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

FRANK DEMETRIC DICKERSON, JR., a/k/a Frankie D, a/k/a Frank Dixon
Defendant - Appellant

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this court. As no member of this Court of the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that is should be denied.

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered at the direction of Judge Michael, U.S. District Court Judge sitting by designation, with the concurrence of Judge Widener and Judge Niemeyer.

For the Court,

/s/ Patricia S. Connor

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**Appendix C:**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA,

v. Criminal No. L-97-410

FRANK DICKERSON.

ORDER

This matter came before the Court for a motions hearing beginning March 31, 1999 and continued on April 6 and 7, 1999. On April 7, 1999, in open court and on the record, the Court made the following rulings, which are hereby confirmed:

(i) DENIED the motion to suppress the items seized during the search of the defendant's vehicle and the motion to suppress telephone numbers taken from the pagers seized during the search. (Dkt. No. 20);

(ii) DENIED with leave to renew the motion for an order directing the government to file a bill of

particulars (Dkt. No. 20);

*(iii)* *RULED that the defendant' double jeopardy* motion was not frivolous, and being advised that the defendant would take an interlocutory appeal of the court's denial of that motion, POSTPONED indefinitely the trial scheduled to begin April 12, 1999; and

(iv) DENIED the defendant's motion to dismiss count one of the second superceding indictment (asserting both prosecutorial misconduct and double jeopardy) and the motion for disclosure of grand jury minutes (Dkt. No. 37).

At the conclusion of the motions hearing, the Court stated for the record the grounds for its denial of the defendant's double jeopardy motion. Those grounds are hereby supplemented by the following summary:

When a defendant advances a non-frivolous double jeopardy argument, the burden shifts to the government to

prove by a preponderance of the evidence that there were in fact two separate offenses. In the present case, this places on the government the burden of demonstrating that the conspiracy charged in the Southern District of Florida in indictment No. L96-378-CR-UNGARO-BENAGES ("the Florida conspiracy") is a separate and distinct conspiracy from the conspiracy charged in this district as criminal case number L-97-410 ("the Maryland conspiracy").

As charged in the indictment, the Florida conspiracy lasted from 1988 to 1991. Concerning scope, the indictment stated that "it was the object and purpose of this conspiracy to distribute cocaine from South Florida throughout the eastern seaboard and midwest states of the United States earning millions of dollars of drug proceeds in the process." (Exh. 1 at 2, Def. Consolidated Pretrial Mot.). From the materials submitted to the Court in this case, the evidence produced by the government with regards to the Florida conspiracy demonstrated the following:

Albert Nelson was a high-level, interstate distributor of multi-kilogram quantities of cocaine. He oversaw an operation which transported, through a regular courier named Richard Williams, cocaine to Dickerson and other large-quantity drug purchasers in cities across the eastern United States. The cocaine was sold to Dickerson and others for cash, rather than on a consignment basis. There is no evidence that Nelson or Hanks had in any involvement in supervising or direction the further distribution of the cocaine after its delivery to Dickerson and the other regional customers. In prosecuting the Florida indictment, the government did not focus on the manner and means by which cocaine was divided, packaged, and resold following its interstate transport. After Nelson was arrested on federal drug charges in May 1990, his place atop the organization was taken by James Hanks. Following James Hanks' death in late 1991, the Nelson/Hanks conspiracy ended.

The Maryland indictment focuses on Dickerson's drug distribution activities in Maryland and Delaware from 1992

through November 21, 1997, when Dickerson was arrested.[1] The government proffers that the purpose of the Maryland conspiracy was to distribute drugs throughout the Delmarva peninsula over the time period 1992 through November, 1997.

There is some overlap between the Florida and Maryland conspiracies. It appears that Dickerson was a drug dealer engaged in continuous operation in Maryland and elsewhere from at least as early as 1988 through November, 1997. It is likely that Dickerson distributed on the Delmarva peninsula cocaine he received from the Nelson/Hanks organization. During the hearing, the government named five individuals who, in furtherance of the Maryland conspiracy,

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[1] The government proffered that its proof at trial will focus on Dickerson's distribution network on Maryland's "Eastern Shore." Maryland is geographically divided by the Chesapeake Bay, with Baltimore and the majority of the population west of the bay and the "Eastern Shore" lying east of the bay. The Eastern Shore is part of the peninsula, commonly known as the Delmarva peninsula, bounded by the Chesapeake on the west and the Atlantic Ocean on the east. Maryland shares the Delmarva peninsula with the state of Delaware.

either purchased cocaine from Dickerson or otherwise aided his Maryland distribution operation. Three of those individuals operated on the Eastern Shore during some part of the duration of the Florida conspiracy (1988-1991).

The essential question is whether this overlap suffices to link all drug activities in which Dickerson participated from 1988 until 1997 into one overriding conspiracy. Stretching conspiracy theory, Dickerson, together with his suppliers, distributors, couriers, and the drug contacts of each (and contacts of contacts) might all be lumped into one very large conspiracy. There is some support in the case law for such a view. Suppliers, wholesale distributors, couriers, and retail salesmen can all be considered part of one conspiracy, eve if they are unknown to one another. A drug distribution conspiracy can continue despite changes in the source of supply. See United States v. Banks, 10 F.3d 1044, 1054 (4th Cir. 1993); United States v. Burgos, 94 F.3d 849, 857-59 (4th Cir. 1996).

In practicality, however, conspiracies have their limits. Courts are routinely faced with the question whether drug activity, occurring over time and involving overlapping participants and places, constitutes a single or multiple conspiracies. See e.g. Bourjaily v. United States, 483 U.S. 171 (1987) (court to determine whether conspiracy existed); United States v. Harris, 39 F.3d 1262, 1267 (4th Cir. 1994) (whether single or multiple conspiracies proven is question of fact.) As adopted in United States v. MacDougall, 790 F.2d 1135, 1144 (4th Cir. 1986) and United States v. Ragins, 840 F.2d 1184, 1188-89 (4th Cir. 1988), the Fourth Circuit directs trial courts to examine five factors when determining if successive conspiracy prosecutions result in a double jeopardy violation. The factors are: 1) time periods involved, 2) statutory offense charged, 3) places where the alleged activities occurred, 4) persons acting as co-conspirators, and 5) the overt acts or any other descriptions of the offenses charged which indicate the nature and scope of the activities to be prosecuted. This test is

to be given a "flexible application," and the court is to examine the "totality of the circumstances." See MacDougall, supra, at 1144.

As stated at the April 7, 1999 hearing, the Court, after applying this test, determined that the Florida and Maryland conspiracies are sufficiently separate in objectives, personnel, and other circumstances to be separately indicted and prosecuted. Accordingly, the defendant's motion to dismiss the conspiracy count on double jeopardy grounds was denied.

IT IS SO ORDERED this 9th day of April 1999.

Benson Everett Legg
United States District Judge